

**United States Department of Labor
Employees' Compensation Appeals Board**

D.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
North Reading, MA, Employer**

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**Docket No. 08-2307
Issued: June 19, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 19, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 6, 2008 merit decision concerning an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received a \$2,066.20 overpayment of compensation; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment, thereby, precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

In January 2004, the Office accepted that appellant, then a 53-year-old custodian, sustained a temporary aggravation of arthritis of his right thumb. It paid him compensation for

periods of disability. Effective April 22, 2005, appellant elected to receive benefits from the Office of Personnel Management (OPM).¹

The record contains documents which establish that on May 14, 2005 the Office issued appellant a \$2,382.36 compensation check covering the period April 17 to May 14, 2005.² Appellant's bank statement shows that he deposited the \$2,382.36 check into his account on May 18, 2005.

In a May 21, 2008 notice, the Office advised appellant that it had made a preliminary determination that he received a \$2,066.20 overpayment of compensation because he elected to receive benefits from OPM beginning April 22, 2005 but continued to receive compensation benefits under the Federal Employees' Compensation Act through May 14, 2005. It made a preliminary determination that he was at fault in the creation of the overpayment because he was aware or should have been aware that he was not entitled to receive dual benefits. Regarding the calculation of the overpayment, the Office stated:

"The claimant was compensated for the period of April 17, 2005 through May 14, 2005 (28 days) and was only entitled to compensation from April 17, 2005 through April 21, 2005 (5 days) creating an overpayment for 23 days. The claimant received a gross compensation of \$2,515.38 which was divided by the 28 day cycle: $\$2,515.38 \div 28 \text{ days} = \$89.8350 \times 23 \text{ days of overpayment} = \$2,066.20$."

In an overpayment questionnaire completed on June 14, 2008, appellant requested waiver of the claimed overpayment and argued that he was not at fault in its creation. He stated that he did not receive his first retirement check from OPM (in the amount of \$1,772.29) until July 11, 2005, adding: "That last workman's compensation check helped me, my wife and four sons to survive at that time for two months before I started to receive my first retirement check."

In an August 6, 2008 decision, the Office finalized its preliminary determination that appellant received a \$2,066.20 overpayment of compensation because he elected to receive benefits from OPM beginning April 22, 2005 but continued to receive Office compensation benefits through May 14, 2005. It further found that he was at fault in the creation of the overpayment because he knew or should have known from the check payment dates and voucher that the Office paid him through May 14, 2005 while he was receiving OPM benefits for the period April 22 to May 14, 2005.³

¹ On July 11, 2005 appellant received his first OPM benefits check, a \$1,772.29 check covering the period April 22 to June 30, 2005. The record contains a document which advised him regarding the period covered by this check.

² The gross amount of compensation appellant received was \$2,515.38 but the actual check was for \$2,382.36 because insurance premium obligations were deducted from the gross amount.

³ The Office directed appellant to send it a check in the amount of \$2,066.20. As recovery from continuing compensation benefits under the Federal Employees' Compensation Act is not involved in this case, the Board has no jurisdiction over the amount the Office determined that appellant should repay each month. *Levon H. Knight*, 40 ECAB 658, 665 (1989).

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁴ Section 8129(a) of the Act provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”⁵

Section 8116(a) of the Act provides that, while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.⁶

ANALYSIS -- ISSUE 1

The evidence of record establishes that appellant received a \$2,066.20 overpayment of compensation. On May 14, 2005 the Office issued appellant a \$2,382.36 compensation check covering the period April 17 to May 14, 2005.⁷ Appellant’s bank statement shows that he deposited the check into his account on May 18, 2005. However, effective April 22, 2005, appellant elected to receive benefits from OPM. Therefore, he was not entitled to receive compensation under the Act for the portion of the check which covered the period April 22 to May 14, 2005 as this created a double recovery.⁸ The Office properly calculated that the portion of the check to which appellant was not entitled equaled \$2,066.20.⁹ For these reasons, it properly found that appellant received a \$2,066.20 overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides that, where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.¹⁰ The only exception to this requirement is a

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 8116(a).

⁷ The gross amount of Office compensation that appellant received was \$2,515.38.

⁸ *See supra* note 6 and accompanying text.

⁹ The Office noted that the \$2,515.38 gross compensation payment covered a period of 28 days and then calculated that the per day rate of compensation was \$89.8350. It multiplied this per day rate of compensation times the 23 days of compensation that appellant was not entitled to receive (April 22 to May 14, 2005) to find that appellant received a \$2,066.20 overpayment.

¹⁰ 5 U.S.C. § 8129(a).

situation which meets the tests set forth as follows in section 8129(b): “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”¹¹ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.¹²

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect....”¹³

Section 10.433(c) of the Office’s regulations provides:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”¹⁴

ANALYSIS -- ISSUE 2

The evidence of record shows that appellant accepted monies that he knew or should have known to be incorrect. The evidence of record clearly confirms that appellant was advised that his OPM benefits would begin April 22, 2005 and that he would not be entitled to receive benefits from the Office under the Act after April 21, 2005. In mid May 2005, appellant received a check for workers’ compensation (in the gross amount of \$2,515.38) and was advised that the check covered the period April 17 to May 14, 2005. He knew or should have known that he was not entitled to that portion of the check covering the period April 22 to May 14, 2005. Appellant had no reason to believe that the portion of the check covering the period April 22 to May 14, 2005 represented compensation to which he was entitled. He did not receive his first

¹¹ *Id.* at § 8129(b).

¹² *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

¹³ 20 C.F.R. § 10.433(a).

¹⁴ *Id.* at § 10.433(c).

OPM check until July 2005 and there would have been no reason for him to have been confused about the source of the Office check he received in May 2005 or the period that it covered.¹⁵

For these reasons, appellant was at fault in the creation of the \$2,066.20 overpayment of compensation. An individual who is at fault in the creation of an overpayment is not entitled to waiver of that overpayment.¹⁶ Therefore, the Office properly determined that appellant was not entitled to waiver of the \$2,066.20 overpayment.

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$2,066.20 overpayment of compensation. The Board further finds that the Office properly determined that appellant was at fault in the creation of the overpayment and that, therefore, the overpayment was not subject to waiver.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' August 6, 2008 decision is affirmed.

Issued: June 19, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁵ In an overpayment questionnaire completed on June 14, 2008, appellant indicated that he did not receive his first retirement check from OPM until July 11, 2005 and stated, "That last workman's compensation check helped me, my wife and four sons to survive at that time for two months before I started to receive my first retirement check." He provided no explanation for why he felt that he was actually entitled to receive Office compensation for the period beginning April 22, 2005.

¹⁶ See *supra* note 12 and accompanying text.